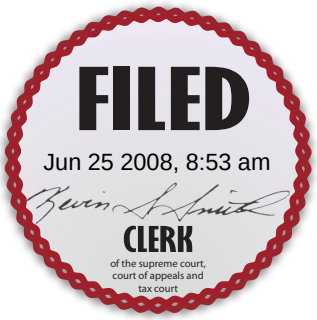

ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP OF A.B., the Child, and CHERYL B., the Mother, and JON R., the Father	)	
JON R.,	)	
Appellant-Respondent,	)	
vs.	)	No. 40A01-0712-JV-552
DEPARTMENT OF CHILD SERVICES,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable Jon W. Webster, Judge
Cause No. 40C01-0605-JT-119

June 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Appellant Jon R. ("Father") appeals the involuntary termination of his parental rights to his son A.B. We affirm.

Issue

Father raises one issue on appeal, which we restate as whether sufficient evidence was presented to support the termination of Father's parental rights.

Facts and Procedural History

On May 29, 2003, Cheryl B. ("Mother")[1] gave birth to A.B. Paternity was not established until February 2006, when a blood test showed that Father was A.B.'s biological father. In 2002, Father was convicted of two counts of class B felony dealing in a controlled substance.[2] At the time A.B. was born, Father was serving his sentence for these offenses in the Jennings County jail and had been incarcerated since December 2, 2002. Between June and September 2003, Mother took A.B. to the Jennings County jail to visit Father. On September 25, 2003, Father was transferred into the custody of the Indiana Department of Correction. Thereafter, Father had no contact with A.B.

Jennings County Department of Child Services' ("DCS") reports indicate that on the day Mother gave birth to A.B., a drug raid was made at her home and that she had left A.B.'s

[1] The trial court terminated Mother's parental rights to A.B. on November 5, 2007. Mother has filed a separate appeal challenging this ruling. Therefore, in this case, we deal exclusively with Father's claims.

[2] The record is not entirely clear on Father's criminal history. The Indiana Department of Correction website, however, reveals that in 2002 Father was convicted in Jennings County of class B felony dealing in a controlled substance and was also convicted in Jackson County of dealing in a controlled substance as a class B felony. Indiana Department of Correction, http://www.in.gov/apps/indcorrection/ofs/ofs?lname=Ray&fname= jon&search1.x=0&search1.y=0 (last visited June 6, 2008).

three siblings alone with an elderly woman who could not properly care for them. Later reports noted that Mother had failed to obtain proper medical care for one of A.B.'s siblings. Based on these conditions along with Mother's impending incarceration on September 12, 2003, DCS filed a petition on September 5, 2003 alleging that A.B. was a child in need of services ("CHINS"). On September 8, 2003, the trial court issued an order finding that A.B. was a CHINS. Thereafter, A.B. was placed in foster care. After Mother was released from incarceration in August 2005, the trial court entered a dispositional decree. Father was not made part of the decree because paternity had not yet been established. Because Father was incarcerated and paternity had not been established, DCS was unable to offer any services to Father.

On April 17, 2006, DCS filed a petition to terminate Father and Mother's parental rights to A.B. The trial court held a hearing on the petition on August 27, 2007. At the time of the hearing, Father was still incarcerated, but was scheduled to be released on December 2, 2007.

During the hearing, DCS case manager Shana Bolden testified that in 2001, before A.B.'s birth, Father was arrested for possession of drugs and dealing drugs. During her testimony, Bolden related a conversation she had with Father in July 2006:

> I asked [Father] . . . what his intentions were, he stated he did want his child back and I asked him what he felt he needed to do to make that happen. He admitted he had not participated in a single service [offered by the Department of Correction in prison], but was on the waiting list. I think he was involved in one of the parenting classes for dads at that time, that is correct, but he was on [sic] waiting list. I questioned substance abuse treatment. He said he hadn't even got on the waiting list for that. I questioned AA. At that time, he stated he was the maintenance man and was on call and couldn't take time to go to the once a week AA meetings. I asked him upon his release how much time he

> thought he needed to be reunified with his son and he stated he would need at least a good year to get on his feet before he could begin building a relationship with his child. Even though I pointed out that his son would be 5 ½, approaching 6, when that happened and he agreed that he would need that much time before he was ready to take him back.

Tr. at 25. Bolden believed that the termination of Father's parental rights was in A.B.'s best interest and that the continuation of the parent/child relationship would pose a danger to A.B. because Father did not know anything about A.B. "other than what [Mother] or [DCS] has told him and will spend a great deal of time just learning about his child." *Id.* at 27. She also noted that A.B. had settled very well into his current foster family and that it would be very traumatic to remove him from their care and place him with either Father or Mother.

DCS case manager Sandy Smith testified that Father told her he was participating in some programs offered in prison by the Department of Correction, but he did not provide her with any official documentation to verify this. Smith opined that termination of Father's parental rights was in A.B.'s best interest because Father and A.B. had never had any type of relationship and because Father did not have the ability at that point to parent A.B. Smith believed that given Father's history, if A.B. was returned to Father's care he would not be in a safe environment.

DCS also entered into evidence a report written by the court appointed special advocate Janice Campbell. With regard to Father, Campbell noted:

> [Father] has been incarcerated since December 2002. He was charged with Dealing Schedule II Controlled Substance. [Father] reported that he was enrolled in Inside Out Dads from which he would graduate on July 31, 2006 and had completed literacy classes. He also planned to enroll in Thinking for a Change. He said as of July 7, 2006, he has had no addictions treatment while in prison.

Appellant's App. at 16. Campbell recommended that Father's parental rights to A.B. be terminated.

Father testified that upon his release from prison he would be on probation for three years. He stated that while in prison, he had received no disciplinary write-ups. Prior to March 2007, Father was incarcerated at a facility in Medaryville, Indiana. While at the Medaryville facility, Father testified that his work as head of maintenance kept him so busy that he was unable to attend substance abuse programs like AA and NA. Father, though, did take a computer class, and participated in a parenting class and a program called "Thinking for a Change." On March 12, 2007, Father was put on work release and was assigned to work for a towing company. Father believed that he would be able to continue to work for the towing company after he was released from prison. Since being placed on work release, Father stated that his drug tests were negative and that he was regularly attending AA, NA, and CA[3] meetings.

On November 5, 2007, the trial court entered an order terminating Father's parental rights to A.B. In its order, the trial court made the following relevant findings of fact and conclusions of law:

[3] CA stands for "Cocaine Anonymous."

I. FINDINGS OF FACT

….

19. Father is currently serving the remainder of his sentence on work release in Indianapolis, Indiana. Father's projected release date is December 2, 2007.
20. [A.B.] has been removed [sic] his parents since September 12, 2003 and consequently has been removed from his parents for at least six (6) months under the Dispositional Decree dated September 16, 2006. As of August 27, 2007, [A.B.] has been removed from his parents for forty-six (46) months.
21. [A.B.] was three (3) months old at the time of his removal. As of August 27, 2007, [A.B.] is four (4) years of age.
22. Father has been incarcerated [A.B.'s] entire life up to this point. Father has participated and completed several programs offered by the Department of Corrections [sic], but because of his incarceration, Father has been unable to participate in services and visitation provided by the [DCS]. None of the programs completed by Father addresses addiction issues.

….

II. CONCLUSIONS OF LAW

1. It is established by clear and convincing evidence that the allegations of the Petition are true in that there is a reasonable probability that the conditions that resulted in the child's removal and the reasons for the placement outside the parents' home will not be remedied, and/or that the continuation of the parent/child relationship poses a threat to the well-being of the child.

….

4. Father has been incarcerated during the entire court [sic] of the [DCS'] involvement. His incarceration rendered him unavailable to have a meaningful relationship with his child or to participate in visitation with his child. No parent-child bond exist [sic] between [Father] and [A.B.]

   Father's history of incarceration and the effects on his child is given considerable weight. Accordingly, the Court concludes that the continuation of the parent-child relationship would pose a threat to the child's well-being.

5. Termination is in the best interest of the child in that the child needs

stability, safety, nurturing and permanence.

Id. at 20-22. This appeal ensued.

Discussion and Decision

Father argues that the evidence is insufficient to support the termination of his parental rights. We disagree.

A. Standard of Review

Under the Fourteenth Amendment to the United States Constitution, parents have the right to establish a home and raise their children. *In re B.D.J.*, 728 N.E.2d 195, 199 (Ind. Ct. App. 2000). However, the law allows for the termination of these rights when an individual is unable or unwilling to fulfill his or her responsibilities as a parent. *Id.* at 199-200. This policy balances a parent's constitutional rights to the custody of their children with the State's limited authority to interfere with this right. *Id.* at 200. "Because the ultimate purpose of the law is to protect the child, the parent-child relationship will give way when it is no longer in the child's interest to maintain this relationship." *Id.*

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we will neither reweigh the evidence nor judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. We consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.*

Here, the trial court made specific findings of fact and conclusions of law in terminating Father's parental rights. In such cases, our standard of review is two-tiered. *In*

re S.P.H., 806 N.E.2d 874, 879 (Ind. Ct. App. 2004). "First, we must determine whether the evidence supports the findings, and, second, whether the findings support the conclusions of law." *Id.* We will not set aside the trial court's judgment terminating parental rights unless it is clearly erroneous. *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615, 620 (Ind. Ct. App. 2006), *trans. denied*. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings of fact do not support the trial court's conclusions thereon, or the conclusions thereon do not support the judgment. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

Indiana Code Section 31-35-2-4(b) provides that in order to terminate a parent-child relationship, the State must prove:

> (A) one (1) of the following exists:
> (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;
> ….
> (B) there is a reasonable probability that:
> (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
> (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
> (C) termination is in the best interests of the child; and
> (D) there is a satisfactory plan for the care and treatment of the child.

Indiana Code Section 31-34-12-2 further provides that the State must establish the elements of Indiana Code Section 31-35-2-4 by clear and convincing evidence.

Additionally, we note that DCS did not file a brief in this appeal. "Where the appellee fails to file a brief, it is within our discretion to reverse the trial court's decision if the

appellant makes a prima facie showing of reversible error." *Harris v. Delaware County Div. of Family & Children Servs.*, 732 N.E.2d 248, 249 (Ind. Ct. App. 2000). Prima facie error in this context is defined as "at first sight, on first appearance, or on the face of it." *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006).

B. Continuation of Parent-Child Relationship Poses Threat to Child's Well-Being

Father argues that DCS did not prove by clear and convincing evidence that the continuation of his parent-child relationship with A.B. posed a threat to A.B.'s well-being. We note that Indiana Code Section 31-35-2-4(b)(2)(B) is written in the disjunctive, and thus, the trial court only had to find one of the two requirements of subsection (B) by clear and convincing evidence. *In re L.S.*, 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), *trans. denied* (2000), *cert. denied* (2002). Therefore, we begin by considering whether sufficient evidence was presented to support the trial court's finding that the continuation of the parent-child relationship posed a threat to A.B.'s well-being.

The trial court should judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *A.F. v. Marion County Office of Family & Children*, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied*. "However, a parent's habitual patterns of conduct must also be considered to determine whether there is a substantial probability of future neglect or deprivation." *Matter of M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. Termination of parental rights can be appropriate not only where the child is in immediate physical danger, but also where the child's emotional and physical development is threatened. *Id.* The trial court need not wait until the child is irreversibly harmed such that her physical, mental, and social

development is permanently impaired before terminating the parent-child relationship. *In re R.S.*, 774 N.E.2d 927, 930 (Ind. Ct. App. 2002), *trans. denied* (2003).

Here, the record reveals that Father remained incarcerated at the time of the termination hearing. Father's criminal history included an arrest in 2001 for possession of and dealing drugs and two convictions in 2002 for class B felony dealing in a controlled substance. After being released from prison, Father will be on probation for three years.

In addition to his criminal history, Father has a history of substance abuse. Between December 2002 and March 2007, Father made little or no effort to participate in substance abuse programs. It was only after Father was placed on work release in March 2007 that he began to regularly attend AA, NA, and CA meetings. The trial court found that the programs Father completed while incarcerated did not address his addiction issues.

Also of great concern is the fact that Father has had no contact with A.B. since September 2003 when A.B. was barely three months old. As a result, Father and A.B. have no parent-child bond or relationship. Because of this, Smith believed that Father did not have the skills needed to parent A.B. She also stated that if A.B. was left in Father's custody, given Father's history, A.B. would not be in a safe environment.

Bolden testified that A.B. needed caregivers attuned to his needs. She believed that because Father had no relationship with A.B., he would spend more time trying to learn about A.B. than providing him with the care he needed. Additionally, Bolden testified that Father told her that after he was released from prison, he would need a year to get back on his feet before he would be ready to care for A.B. Such evidence is cause for concern as we have previously stated that the needs of a child are too substantial to force the child to wait

while determining if an incarcerated parent would be able to be a parent for him. *See In re S.P.H.*, 806 N.E.2d at 883.

Based on the fact that Father was incarcerated at the time of the termination hearing, his criminal history, his history of substance abuse, his lack of any contact or relationship with A.B., and questions about his ability to care for A.B., sufficient evidence was presented by DCS to support the trial court's conclusion that the continuation of the parent-child relationship posed a threat to A.B.'s well-being.[4]

C. Termination is in the Best Interests of the Child

Father next argues that there was insufficient evidence to show that termination of the parent-child relationship was in A.B.'s best interest. In determining what is in the best interests of the child, the trial court is required to look at the totality of the evidence. *A.F.*, 762 N.E.2d at 1253. "In doing so, the trial court must subordinate the interests of the parents to those of the children involved." *Id.*

"A parent's historical inability to provide adequate housing, stability and supervision coupled with a current inability to provide the same will support a finding that termination of the parent-child relationship is in the child's best interests." *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006), *trans. denied*. Because Father has been incarcerated since before A.B.'s birth, he has an historical inability to provide adequate housing, stability, and supervision for A.B. *See id.* Likewise, Father's continued

[4] Having determined that the trial court properly concluded that the continuation of the parent-child relationship posed a threat to A.B.'s well-being, we need not consider whether the trial court properly concluded that the conditions that resulted in the removal of A.B. from Mother and Father's care were not remedied. *See In re L.S.*, 717 N.E.2d at 209.

incarceration at the time of the August 2007 termination hearing is evidence of his current inability to provide the same. *See id.*

Additionally, both Smith and Bolden testified that it was in A.B.'s best interest to terminate Father's parental rights. Noting that Father had no contact with A.B. after September 2003 and consequently had not developed a parent-child relationship with him, Smith believed that Father lacked the necessary skills to parent A.B. Considering Father's history, Smith also asserted that if A.B. were left in Father's custody he would not be in a safe environment. Bolden noted that A.B. had settled into his current foster family very well and that removing him from that family would be traumatic.

Based on the totality of the evidence, we conclude that the trial court's determination that termination of Father's parental rights is in A.B.'s best interest is supported by clear and convincing evidence.

Conclusion

The trial court's judgment terminating Father's parental rights is supported by clear and convincing evidence. Therefore, the trial court's order terminating Father's parental rights is affirmed.

Affirmed.

BARNES, J., and BRADFORD, J., concur.